89-1815

Supreme Court, U.
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JOSEPH F. SPANIOL, JR.
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No.

SUPREME COURT OF THE UNITED STATES

October 1990 Term

DONNA TOZZI

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER JUDGES OF THE UNITED STATES DISTRICT COURTS RETAIN THE DISCRETION AFFORDED BY RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AS PREVIOUSLY CONSTRUED BY THIS COURT TO GRANT A NEW TRIAL TO A DEFENDANT "IF REQUIRED IN THE INTEREST OF JUSTICE" NOTWITHSTANDING THE PASSAGE OF THE COMPREHENSIVE CRIME CONTROL ACT OF 1984, Pub. L.No. 98 - 473 AMENDING 18 U.S.C. § 3731, AND IF SO, WHAT THE APPROPRIATE STANDARD FOR REVIEW IS; IF NOT, WHETHER THE COURT OF APPEALS MAY PROPERLY SUBSTITUTE ITS ASSESSMENT OF THE CIRCUMSTANCES, FACTS, AND WITNESSES DICTATING THE GRANT OF A NEW TRIAL FOR THAT OF THE TRIAL COURT.

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REPORTS OF PREVIOUS OPINIONS

A Memorandum Opinion and Order was entered by the Honorable Donald E. Ziegler of the United States District Court for the Western District of Pennsylvania on May 31, 1989 and is set forth at Appendix 1a.

An opinion was filed by the United States Court of Appeals for the Third Circuit on January 8, 1990 reversing the Order of the District Court; a copy of the opinion is set forth at Appendix 14a and is reported at 893 F.2d 40 (3rd Cir. 1990).

A Petition for Rehearing was filed with the Court of Appeals for the Third Circuit and denied on February 16, 1990 - the Order is set forth at Appendix 29a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on January 8, 1990 reversing the decision of the United States District Court for the Western District of Pennsylvania granting Petitioner's Motion for a New Trial.

A timely Petition for Rehearing was filed in the United States Court of Appeals for the Third Circuit and denied on February 16, 1990.

Jurisdiction to review the judgment entered by the United States Court of Appeals for the Third Circuit is conferred upon this Court by 18 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The Petitioner, Donna Tozzi, was indicted for alledgedly conspiring to defraud the United States by impeding and/or interfering with the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. § 371 and first tried, along with a co-defendant, during a trial which lasted approximately six weeks. Although her co-defendant was convicted the jury in the first case was unable to reach a decision and a mistrial was declared by the trial court.

A second week long trial resulted in a two day deliberation during which the jury again advised the District Court that it was unable to reach a decision in the case, however, after being ordered to deliberate further by the District Court the Petitioner was convicted.

Thereafter, prior to sentencing, the Petitioner discovered that one of the jurors who had deliberated in the case had expressed to an alternate juror his supposed knowledge of prior criminal conduct on the part of Donna Tozzi during the trial and had further expressed a conviction that she was guilty of the offense charged prior to the conclusion of the trial and before deliberations had begun. A Motion for a New Trial was filed pursuant to Rule 33 of the Federal Rules of Criminal Procedure on behalf of the Petitioner and the alternate juror testified to the facts set forth above which were denied by the juror who had actually participated in the deliberations. The juror admitted that he had been interviewed by an agent of the Internal Revenue Service and had executed an affidavit denying the allegations. The interview was in violation of an

Order of the District Court expressly forbidding contact with the witnesses by agents of the Internal Revenue Service prior to the evidentiary hearing. The alternate juror also submitted to a polygraph examination tending to establish his veracity which was submitted to the District Court prior to its decision.

On May 31, 1989, the Honorable Donald E. Ziegler of the United States District Court filed a Memorandum Opinion and entered an Order granting the Motion of Donna Tozzi for a new trial.

The District Court expressly relied upon the mandate of Rule 33 of the Rules of Criminal Procedure whereby the Court "may grant a new trial to [a] defendant if required in the interest of justice". The reasons recited in the Memorandum Opinion are as follows:

1. Troubling allegations and evidence of possible juror bias;

2. The fact that the juror's denial of impropriety had occurred after a pre-hearing interview by agents of the government in violation of the Court's Order;
3. That the jury had reached a verdict in the second trial after nearly two days of deliberations and after notifying the Court that they were unable to reach a verdict;
4. The fact that it was a second trial and that the Petitioner had been tried on the same charge earlier in the year and that jury was also unable to reach a unaminous verdict.

After recitation of the foregoing grounds the Court recited the language extracted from Rule 33 set forth above and concluded by stating: "Here, under all of the peculiar facts and circum-

stances, we hold that the interest of justice will best be served by granting the motion of defendant for a new trial".

The prosecution, pursuant to 18 U.S.C. § 3731, filed an appeal to the United States Court of Appeals for the Third Circuit contending that the District Court had failed to find as a fact that the juror who professed extra judicial knowledge of the Petitioner had harbored a bias against her. In doing so the prosecution relied upon opinions of both the Third Circuit Court of Appeals and this Court which related exclusively to standards enunciated in reviewing the denial of a request for a new trial based upon juror bias.

The Court of Appeals for the Third Circuit reviwed the decision of the District Court based upon the standards set forth in United States v. Adams, 751 F.2d 1099 (3d Cir.), cert. denied, 474

U.S. 906, 106 S. Ct. 275 (1985) wherein an abuse of discretion standard was set forth for reviewing the denial of a motion for a new trial based upon juror bias. The Court of Appeals, although ostensibly utilizing the foregoing standard, did not reach the question of whether juror bias had in fact existed in that a determination was made that the District Court did not credit the testimony of the alternate juror who described the misconduct of the juror actually engaged in the deliberations and further stated that there was no other basis for the grant of a new trial. The Court of Appeals did not discuss what standards apply to nor recite any authority in respect to the assessment of the trial court's authority to grant a new trial in the interest of justice as provided by Rule 33.

ARGUMENT

I.

The decision of the United States Court of Appeals for the Third Circuit in this action represents an important question of Federal Law in respect to the construction of Rule 33 of the Federal Rules of Criminal Procedure in light of the Comprehensive Crime Control Act and prior decisions of this Court construing the Rule which has not been but should be settled by this Court.

Rule 33 of the Federal Rules of Criminal Procedure expressly and appropriately reserves to the jurist best situated to make the assessment the discretion to grant a new trial to a defendant when required by the interests of justice. Although both the government and the Court of Appeals appear to have determined otherwise, the determination

of exactly what measure of discretion is reserved to the District Courts by the language set forth above entails a far different analysis than the simple resolution of whether or not a trial court abused its discretion in denying a party's request for a new trial in a criminal action.

While the abuse of discretion standard utilized by the Court of Appeals in this action and which has been adopted by this Court in reviewing the denial of motions for a new trial is then appropriate, the application of this standard is equally inappropriate to and inconsistent with the discretion reserved to the District Courts by Rule 33 to grant new trials when required in the interest of justice.

Prior decisions of this Court in the rare instances in which review has been undertaken have reflected that the

very basis upon which the prosecution has relied and which has been adopted by the Court of Appeals is not required when granting relief pursuant to this provision of the Rule. See, United States v. Smith, 331 U.S. 469, 67 S.Ct. 1330, reh. denied, 332 U.S. 784, 68 S.Ct. 28 (1947).

The opinion in Smith clearly reflects that a District Court, when granting a new trial in the interests of justice, need not catalogue the grounds therefore nor must the Court include other than a general statement of the reasons for the grant of a new trial. The decision of the Court of Appeals in this matter is both in conflict with the construction of Rule 33 espoused in Smith and inconsistent with the need on the part of the member of the judiciary best situated to make the assessment to have the authority to determine that not

one single glaring error or fact but that the cumulative weight of several factors, none of which taken alone might be enough to warrant a new trial may collectively mandate that a new trial be afforded. Thus in the captioned action, assuming, en arguendo, that no single fact or aspect of the case relied upon by the District Court was in and of itself sufficient to warrant the grant of a new trial, Rule 33 as well as the prior decisions of this Court clearly appear to confer upon the District Court the discretion to grant a new trial when mandated by the interests of justice.

Neither the prosecution nor the Court of Appeals has recited any authority for the propositon that the standard relied upon by the Third Circuit Court of Appeals in assessing the decision of the lower court is appropriate to circumstances where a new trial has been grant-

ed as opposed to denied. The necessity of a trial court making written findings of fact in the event a defendant's motion for a new trial is denied is clear in that an Appellate Court must be afforded a record sufficiently clear to ensure that the denial of a new trial did not constitute an abuse of discretion under the facts in a given case. No such concern, however, should manifest itself when the grant of a new trial is appropriately entrusted to the Judge who heard the evidence, the facts, and is familiar with all of the factors, both on and off the record, that lead to a determination of what in a given case is required by the interests of justice. This Court to date has, to the best of the knowledge of Petitioner's counsel, not spoken to the issue of in what manner the propriety of a grant of a new trial is to be assessed since the pas-

sage of the Comprehensive Crime Control Act has made it routinely subject to scrutiny by the Appellate Courts. Reliance upon the bare language of the Rule and/or decisions like Smith will invarably lead to a significant danger of confusion upon the part of counsel and the trial courts in respect to what must be articulated to support the grant of a Rule 33 motion. Accordingly, the question of what discretion remains to a District Court Judge and what standards are to be utilized in the evaluation of the grant of Rule 33 motions should be settled by this Court by granting the Writ sought herein and resolved in favor of the Petitioner.

II.

The decision of the United States Court of Appeals for the Third Circuit represents a significant departure from

the accepted and usual course of judicial proceedings by virtue of its patent substitution of its judgment for that of the trial court based upon determinations of the trial court's assessment of credibility which are perforce speculative.

Review of the opinion of the District Court in the captioned action reflects clearly that while certain observations were made at the conclusion of the evidentiary hearing in respect to the alleged juror misconduct that no determination as to the ultimate credibility of the witnesses had been made by the trial court. Indeed, the very language of the opinion reflects that a careful assessment of credibility was made by the District Court and a finding made that the evidence of juror bias or prejudice was sufficiently proved to, at

minimum, rise to the level where it could not be discounted.

The Court of Appeals, instead of relying upon the District Court's final assessment, that is, the Court's opinion chose to rely upon remarks made on the record by the trial court at the conclusion of the hearing which were obviously recited prior to full consideration of the matter.

Given the foregoing, the assessment by the Court of Appeals has resulted in either the complete usurpation of the District Court's discretion and role as a fact finder or, at minimum, represents at best an educated guess as to the trial Court's determination of credibility - neither result would appear to be within the contemplation of the Comprehensive Crime Control Act.

The judgment of the Court of Appeals should accordingly be reversed, or

in the alternative, modified to require a remand to the trial court for clarification of the issue addressed above.

DATED: MAY 17, 1990

RESPECTFULLY SUBMITTED

VICTOR HUNTER PRIBANIC
Attorney for Petitioner

CERTIFICATE OF MEMBERSHIP IN BAR

I, Victor Hunter Pribanic, hereby certify that I am a member of the Bar of this Court.

VICTOR HUNTER PRIBANIC

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Criminal No. 87-228
ROBERT THOMAS SKELTON, DONNA E. TOZZI, DEAN ANTHONY TOZZI, ALAN FRANK and JOHN A. KOVAL, SR.,	)	
Defendants.	)	

MEMORANDUM OPINION

ZIEGLER, District Judge

Presently before this court is the motion of defendant, Donna Tozzi, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. After a seven-day jury trial, Tozzi was convicted of conspiring to defraud the United States in violation of 18 U.S.C.

§ 371. Sentencing was set for November 15, 1988. At the time for sentencing, the court was advised by defense counsel that on November 15, 1988, an alternate juror, Robert Gneuhs, had contacted John A. Koval, Sr., and informed him that another juror in the Tozzi trial had made statements which indicated a personal bias against Donna Tozzi.

Imposition of judgment of sentence was continued to afford defendant an opportunity to file the instant motion. Attached to the motion is the affidavit of Robert Gneuhs, wherein he states that Homer Farabaugh, a juror in the Tozzi trial, told Gneuhs during the trial that Farabaugh knew of defendant's "booking on the avenue" when she was young and that she was not a naive person. Affidavit of Gneuhs at ¶¶ 1 and 2. Gneuhs understood "booking to refer to illegal gambling activity. According to

Gneuhs, on the third day of the six-day trial, Farabaugh stated that Tozzi was guilty. Affidavit of Gneuhs at ¶ 2. An evidentiary hearing was held on January 13, 1989.

Gneuhs testified at the hearing that he knew John Koval, a co-defendant of Donna Tozzi who testified at her trial, and had met Thomas Skelton, also a co-defendant and husband of Tozzi, whose whereabouts are currently unknown. The name of Thomas Skelton was mentioned frequently during the trial. Gneuhs further testified that he called Koval on November 15, 1988 for advice concerning the vending machine business because defendants were involved in that business as evidenced by the testimony at trial. During the conversation, Koval inquired concerning the trial and Gneuhs told Koval about the statements that

Farabaugh allegedly had made regarding Tozzi.

Although Gneuhs states by affidavit that Farabaugh said that Tozzi was guilty, at the hearing, Gneuhs was not certain that Farabaugh had actually used the term "guilty." Tr. at 9. He testified that Farabaugh stated that Tozzi was "not a naive person, that she was very street wise" to the other jurors, but Gneuhs did not believe that the other jurors had overheard Farabaugh's comments regarding Tozzi's alleged "booking" activities. Tr. at 9. According to Gneuhs, Farabaugh told the other jurors that he had served on other juries in the past year. Tr. at 36.

Farabaugh denied most of the statements attributed to him by Gneuhs. He testified that he knew nothing about Donna Tozzi prior to the trial and although he was called for jury duty sev-

eral times recently, he never served on a jury until the Tozzi trial. Tr. at 56 and 60. Farabaugh admitted that he may have stated that defendant was not naive, but not three days into the trial, and only because that was his opinion after hearing the testimony. Tr. at 61.

We are faced with the allegation that a juror in the trial of Donna Tozzi was biased and failed to answer truthfully a material question on voir dire. The government urges that we apply the actual bias standard set forth in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984) as follows: [A] party must first demonstrate that a juror failed to answer honestly a material questions on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for con-

cealing information may vary, but only those that affect a juror's impartiality can truly be said to affect the fairness of a trial." Id. at 556.

The evidence of bias lies in the contradicted testimony of alternate juror Gneuhs. Noting that "there is a paucity of cases in the federal courts which have dealt with proven juror bias, the Court of Appeals for the Eighth Circuit suggests that such paucity "results from the fact that 'actual' juror bias is difficult, if not impossible, to prove" because of the reluctance of jurors to admit their prejudices. United States v. Dean, 667 F.2d 729, 732 (8th Cir. 1982), cert. denied, 456 U.S. 1006 (1982). The court further stated that "generally speaking, post verdict orders for new trials on account of suspected but unproven juror bias are, and should be, granted only where the proba-

bility for juror bias is so great that in fairness it cannot be ignored." Id. at 732.

A criminal defendant is entitled to a determination of guilt by an unbiased jury based solely upon evidence properly admitted in court. Government of Virgin Islands v. Dowling, 814 F.2d 134, 138 (3d Cir. 1987). "Information about prior criminal convictions or activities is the kind of information that carries great potential for prejudicing the jury." Id. at 138.

The determination whether a juror was biased "is essentially one of credibility, and therefore largely one of demeanor." Patton v. Yount, 467 U.S. 1025, 1038 (1984). We noted at the conclusion of the hearing that Farabaugh was the more credible witness. Tr. at 70-72. Nevertheless, defendant urges that we temper that determination be-

cause "the government had been specifically admonished not to contact Homer Farabaugh by or through the agency of the Internal Revenue Service or the Federal Bureau of Investigation," and yet two agents from the Internal Revenue Service visited Farabaugh at his home to question him about the statements attributed to him by Gneuhs. According to defendant, the court was "forever deprived . . . of a vital litmus test of credibility." Brief of Defendant in Support of a New Trial at 5.

Farabaugh admitted that he was frightened and confused by the visit from the agents of the Internal Revenue Service, Tr. at 62-63, and the impact of such a visit upon Farabaugh's testimony cannot be discounted. It is not unreasonable to assume that a juror who felt that "the trial went on, it was over with and was done with," and who "had no

idea what was going on" when the agents arrived at his home, may have been intimidated by the experience. Tr. at 62-63.

Acknowledging the standard of actual bias the government urges that we apply to these facts, the Court of Appeals for the Third Circuit has suggested that there may nevertheless be an appropriate circumstance in which the use of "implied bias" may be approrpiate." United States v. Ferri, 778 F.2d 985, 993 (3d Cir. 1985), cert. denied, 476 U.S. 1172 (1986), 479 U.S. 831 (1986). We conclude that a new trial is required for several reasons.

First, the allegations and evidence of possible juror bias are troubling. Second, the denial of impropriety by the juror must be tempered by the pre-hearing interview by agents of the government in violation of this court's order. Third, the jurors reached a verdict in

the Donna Tozzi trial after nearly two days of deliberations and after notifying the court that they were unable to reach a verdict. Finally, this trial was not the first for Donna Tozzi. She was tried on the same charges earlier in the year and the jury was unable to reach a unanimous verdit. Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice."

"Juror bias need not be established with unmistakable clarity." United States v. Salamone, 800 F.2d 1216, 1226 (3d Cir. 1986). Here, under all of the peculiar facts and circumstances, we hold that the interests of justice will best be served by granting the motion of defendant for a new trial.

A written order will follow.

DATED: May 31, 1989

S/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: James Y. Garrett, AUSA
Constance M. Bowden, AUSA
Victor H. Pribanic, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Criminal No. 87-228
ROBERT THOMAS SKELTON, DONNA E. TOZZI, DEAN ANTHONY TOZZI, ALAN FRANK and JOHN A. KOVAL, SR.,	)	
Defendants.	)	

ORDER OF COURT

AND NOW, this 31st day of May, 1989,

IT IS ORDERED that the motion of defendant, Donna E. Tozzi, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure be and hereby is granted.

S/ Donald E. Ziegler
Donald E. Ziegler
United States District Judge

cc: James Y. Garrett, AUSA
Constance M. Bowden, AUSA
Victor H. Pribanic, Esq.

Filed January 8, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3456

THE UNITED STATES

vs.

ROBERT THOMAS SKELTON
a/k/a Tommy Skelton, a/k/a Tommy Hayes Skelton
DONNA TOZZI a/k/a Donna E. Skelton
DEAN ANTHONY TOZZI
ALAN FRANK a/k/a A. Roy
JOHN A. KOVAL, SR.

United States of America,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
Criminal Action No. 87-228 [Rule 33]

Argued December 12, 1989

BEFORE: SLOVITER, GREENBERG and SEITZ,
Circuit Judges

(Filed January 8, 1990)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

The United States, pursuant to 18 U.S.C. § 3731, appeals from an order of May 31, 1989, granting appellee, Donna C. Tozzi, a new trial following her conviction under 18 U.S.C. § 371, for conspiring to defraud the United States of income tax due and owing.

The circumstances leading to this appeal are as follows. An indictment was returned in the Western District of Pennsylvania charging Tozzi, and certain other defendants, with tax offenses relating to the affairs of Acme Music Company, which owned coin operated vending machines generating substantial sums of cash. The prime operator of Acme was, at least for some time, Robert Thomas Skelton, who was also indicted but who, according to the briefs, is a fugitive and has not been apprehended.[1] For some period,

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1. In her brief, Tozzi describes Skelton as being her husband but the government in its brief questions that assertion and thus his status is in doubt. The parties characterize Acme's business

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Tozzi was involved in the operation of the business, signing checks, handling cash, ordering parts, and signing employee withholding forms. There can be no doubt but that Acme did not file tax returns reflecting substantial sums of income.

Tozzi was tried twice. At the first trial, she was tried with a co-defendant, Alan Frank, who was convicted on two counts and acquitted on one. The jury, however, was unable to reach a verdict in her case and thus there was a mistrial as to her. At the second trial, at which she was the only defendant, the jury was given the case on October 5, 1988, after summations and the charge. On October 6, 1988, the jury advised the court that it was unable to reach a verdict, but it nevertheless continued to deliberate and, on October 7, 1988, it found Tozzi guilty.

On November 18, 1988, at the scheduled sentencing, Tozzi's attorney told the court that the previous day he had indirectly learned from an alternate juror that one of the jurors who actually deliberated had prejudicial information regarding Tozzi, which had not been revealed in the *voir dire*. In particular the attorney indicated that the alternate juror, Robert Gneuhs, had a few days earlier contacted John A. Koval, Sr., an employee of Acme who was a defendant named in the indictment, and had given Koval the information about the other juror. Koval, who had earlier pleaded *nolo contendere* and received a noncustodial sentence, testified at Tozzi's trial. Koval passed Gneuhs's information on to Tozzi's attorney. The court responded that to obtain relief Tozzi's attorney would have to file affidavits and it authorized

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somewhat differently. The government refers to it as being a coin operated vending machine company and, as a matter of convenience, we will so refer to it rather than use Tozzi's characterization of its business as being coin operated amusement machines.

him to obtain an affidavit from Gneuhs. The court said that, if necessary, a hearing would be held. The Assistant United States Attorney agreed with this procedure and consequently the sentencing was postponed.

On November 29, 1988, Tozzi filed a motion for a new trial, reciting that Gneuhs had, after Tozzi's trial, disclosed to Koval, who was "an acquaintance of Mr. Gneuhs," the information described in an affidavit of Gneuhs annexed to the motion. She further set forth that on November 17, 1988, her attorney met with Gneuhs and questioned him and then brought the matter to the attention of the court the next day at the sentencing hearing. According to Gneuhs's affidavit, Homer Farabaugh, a juror in the case, advised Gneuhs at the trial that he knew that Tozzi had been "booking" on the avenue at the age of 14, an activity which Gneuhs understood to involve illegal gambling. Gneuhs further recited that during the third day of the trial Farabaugh advised him that Tozzi was guilty and was not a naive person. Gneuhs stated that Farabaugh had "a distinct bias" against Tozzi. Gneuhs also indicated that he disclosed this information to Koval on November 15, 1988, and to Tozzi's attorney on November 28, 1988. It appears, therefore, that there is some confusion as to when Tozzi's attorney met with Gneuhs, as the motion recited it was on November 17, 1988.

On December 27, 1988, a status conference was held on the motion. At that time, the court indicated that approximately two weeks earlier it received a call concerning whether an Internal Revenue Service representative could question Farabaugh and take a statement from him. The court had denied that request, as it considered that the best approach would be to permit only the attorneys to question the juror. The Assistant United States Attorney then indicated that there had been a misunderstanding, as Special

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Agent Robert Clark of the Internal Revenue Service had already interviewed Farabaugh. The court indicated that it had not wanted that to happen and directed that Tozzi's attorney be given a written summary of the interview. The summary was then produced and it reflected Farabaugh's statement that he had not known the individuals associated with the trial, including Tozzi, and that he had not advised Gneuhs during the third day of the trial that Tozzi was guilty. He did confirm that he had spoken during the trial with Gneuhs who told him that he knew some of the witnesses and he advised Gneuhs to tell the bailiff or the judge about that.

On January 13, 1989, there was a hearing at which several witnesses testified. Gneuhs testified that he was an independent contractor. He said he had known Koval and also indicated that he knew of Skelton and "I believe I had the acquaintance with a group of people to meet with him, yes." He said he had once been called to the Acme building but had not gone there. He did, however, describe dealings he had had with Koval and Acme, and indicated that he had telephoned Acme "over the years," and over the last two years had sought donations from Acme for a women's softball team.

Gneuhs said that it "appeared very clear to me by the third day of the trial, that Mr. Farabaugh was very biased and could hardly seem objective in his decision. He [Farabaugh] indicated that Donna Tozzi was not a naive type person, that she was very street wise, and personally he had indicated to me, and I do not believe that anybody else overheard it, but that he knew of her booking on the avenue when she was younger." Gneuhs also testified that both he and Farabaugh "knew of Acme Music" and that Farabaugh "had some type of contact or personal regrets with them because of some dealings in the past. I don't know whether it was against Donna [Tozzi] or whether it was against

Tom Skelton or whether it was against somebody collecting for Acme Music."

Gneuhs reiterated that Farabaugh mentioned Tozzi's bookmaking activities during the third day of the trial and that Farabaugh, in Gneuhs's "personal opinion . . . had been rubbed wrong in the past and he could not be objective in his decision." Gneuhs said that even before the jury retired Farabaugh said that Tozzi was guilty and repeated that "she was not a naive person, that she was very street wise and she knew that -- what was going on."

Gneuhs also explained how he had come to reveal his information. He indicated that the day after he was relieved of jury duty he was at a junk yard getting parts for his car where he told Madeline Stevens, the wife of the owner, that he had been on the jury. He described the jury to Stevens and said that one juror had been biased. It appears that this conversation occurred while the trial was still in progress because Gneuhs told Stevens that the other jurors favored Tozzi and that he expected a "hung jury."

Gneuhs further testified that around November 14 or 15, 1988, he called Koval about business and told him about the situation with the jury at the trial. He testified also that he had not anticipated that his information about the jury would have any bearing on the case.

On cross-examination, Gneuhs indicated that the Internal Revenue Service had filed a lien against him and had levied on his bank account. He admitted that he had not filed tax returns for 1985, 1986 and 1987 but claimed that he owed no taxes for those years. He also said that he helped out in a bar owned by Jules Lemal that had Acme vending machines in it. He acknowledged that he had an "association" with Koval, had played golf with him, and had solicited money from him, and sought to do business with him. Gneuhs

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testified that after he told Koval what happened with the jury, Koval got back in touch with him and asked if he would talk with Tozzi's attorney, which he did. He later gave the affidavit attached to the motion for the new trial.

Madeline Stevens testified that she had gone to high school with Donna Tozzi and knew Gneuhs. She said that after Gneuhs was released from the jury, he stopped by the junk yard and said "in a nutshell," "that he was worried about Donna getting a fair shake." She said that Gneuhs "was just concerned about her" and that she said "I hope things go well, too." On cross-examination, Stevens indicated that the "gist" of what Gneuhs was saying was that he hoped things would go well for Tozzi.

Robert Clark, the Internal Revenue Agent, testified that he obtained affidavits from Gneuhs and Farabaugh and that he conducted his interviews after discussing the matter with the Assistant United States Attorney. He said he had found the public lien against Gneuhs but had not examined his tax returns.

Farabaugh testified on examination by the court that he was a retired truck driver and delivery man, served on the Tozzi jury, never told an alternate juror in Tozzi's case he knew her before the case or that she had been booking on the street, did not use that term and never told an alternate juror that Tozzi was not naive and was probably guilty. On examination by Tozzi's attorney, he said he had never met, seen, or heard of Tozzi before the case. He said that he had "no idea why this man [Gneuhs] fabricated that story" regarding what he had allegedly said about Tozzi and he "was startled when [he] heard it." He also said that he had never met Gneuhs before the trial, was never alone with Gneuhs during the trial, and never said that Tozzi was not a naive person. When Clark showed him Gneuhs's affidavit, he said he "read it and started to

laugh. I thought it was foolish. I never heard anything like it in my life." He said that Gneuhs's affidavit was funny "because he fabricated it. It's a total fabrication. There wasn't one part in there that I found to be anywhere near what went on, or anything else. I never went to lunch with him. I never talked with him privately or separately or anything." He said that when Gneuhs said he knew some of the people in the case he told him to tell the bailiff. He said that he was frightened when Clark contacted him but that was because a window had been broken at his house rather then because of Clark's visit.

Jules Lemal testified that he has a bar and restaurant and knows Gneuhs from golfing and from the circumstance that Gneuhs would help him out for free in his bar. He said that Gneuhs and Koval played golf together and "they seemed to be pretty close friends." He also said that Koval was involved with Acme in vending machines and he, Lemal, had Acme machines because of his association with Koval which he developed through Gneuhs.

At the conclusion of the evidence, the court said "Mr. Farabaugh was an impressive witness, quite frankly. Very impressive. He's the kind of witness that comes in here year after year in the various courts of this republic and is believed. Gneuhs, I suggest to you, is not . . . Farabaugh came off as a believable witness. Gneuhs did not. He's verbose. He's wordy. He's somewhat arrogant. He has a checkered past and a close association with Koval, and he doesn't make a very good impression, to be perfectly candid with you. The body language is bad. He appears to be, quite frankly, a clever and cunning individual. Now, I suppose only the good Lord knows who is telling the truth. But, based upon their demeanor on the witness stand, Farabaugh would be believed and Gneuhs would not. It's just that simple."

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The court then suggested that there could be a polygraph examination. While Tozzi's attorney agreed to this, the government pointed out that there were problems with that suggestion and the matter was dropped.[2] The court indicated that it would take the matter under advisement and that an opinion would follow.

The court ruled on the matter in a memorandum opinion of May 31, 1989. The court set forth the procedural history of the case and described the testimony at the hearing. It then said that "[w]e are faced with the allegation that a juror in the trial of Donna Tozzi was biased and failed to answer truthfully a material question on *voir dire*."[3] The reference to the *voir dire* seems to have been to a question about prior knowledge of Tozzi. The court said that the government asserted that actual juror bias had to be shown to justify the granting of a new trial, citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850 (1984). The court indicated that "[t]he evidence of bias lies in the contradicted testimony of alternate juror Gneuhs." The court, citing *United States v. Dean*, 667 F.2d 729, 732 (8th Cir.), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296 (1982), then said that there is a paucity of cases in which actual juror bias is demonstrated because jurors are reluctant to admit their prejudices. The court also

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2. No inference can possibly be drawn from the discussion regarding a polygraph.

3. An issue was also raised as to the accuracy of Farabaugh's answer on *voir dire* regarding prior jury service. He apparently had previously been called for jury duty but had never sat on a case. We have not, however, described the evidence relating to it, as the district court did not rely on the issue of Farabaugh's prior jury service in ruling on the new trial motion and the matter was only mentioned in passing in the opinion.

said that new trials should be granted on account of suspected but unproven bias only where the probability for juror bias is so great that in fairness it cannot be ignored. It indicated, citing *Government of Virgin Islands v. Dowling*, 814 F.2d 134, 138 (3d Cir. 1987), that a defendant is entitled to a determination of guilt by an unbiased jury based solely upon evidence properly admitted in court, and that information about prior criminal convictions or activities carries great potential for prejudicing the jury.

The court said that the determination of whether a juror was biased is essentially one of credibility and therefore largely one of demeanor, citing *Patton v. Young*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 2892 (1984), but that it had "noted at the conclusion of the hearing that Farabaugh was the more credible witness." The court observed, however, that against its wishes Farabaugh had been visited by the Internal Revenue Service and his statement had been taken. The court said Farabaugh had been frightened and confused by the visit and its impact on his testimony "cannot be discounted." It then said that this court has suggested that there may be circumstances in which there can be a finding of implied bias. *See United States v. Ferri*, 778 F.2d 985, 993 (3d Cir. 1985), *cert. denied*, 476 U.S. 1172, 102 S.Ct. 2896, 479 U.S. 831, 107 S.Ct. 117 (1986).

Ultimately it decided that a new trial was required for several reasons:

> First, the allegations and evidence of possible juror bias are troubling. Second, the denial of impropriety by the juror must be tempered by the pre-hearing interview by agents of the government in violation of this court's order. Third, the jurors reached a verdict in the Donna Tozzi trial after nearly two days of deliberations and after notifying the court that they were unable to reach a verdict.

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> Finally, this trial was not the first for Donna Tozzi. She was tried on the same charges earlier in the year and the jury was unable to reach a unanimous verdict.

The court concluded that Fed. R. Crim. P. 33 provides that the "court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice," that juror bias need not be established with unmistakable clarity, citing *United States v. Salamone*, 800 F.2d 1216, 1226 (3d Cir. 1986), and that "under all of the peculiar facts and circumstances, we hold that the interests of justice will best be served by granting the motion of the defendant for a new trial." This appeal followed.

There is, of course, no question but that we approach this appeal with deference to the district court, as rulings on motions for new trials are committed to its sound discretion and thus may be reversed only for abuse of that discretion. *See United States v. Adams*, 759 F.2d 1099, 1108 (3d Cir.), *cert. denied*, 474 U.S. 906, 106 S.Ct. 275, 474 U.S. 971, 106 S.Ct. 336 (1985). Even so, we find no basis to support the order for a new trial. At the conclusion of the hearing on January 13, 1989, the court made very specific findings that it believed Farabaugh and not Gneuhs, hardly a surprising conclusion in view of Gneuhs's dealings with Koval both before and after Gneuhs's jury service. Furthermore, Gneuhs seems to have been interested in the case as he expressed concern to Stevens about Tozzi getting a "fair shake," and, according to Stevens, was concerned about her. We also note that in his testimony at the hearing he referred to Tozzi by her first name, perhaps reflecting a certain familiarity with her. Thus, it is not surprising that the district court did not in its memorandum

opinion retreat from its findings at the conclusion of the evidence that Gneuhs was not believable.[4]

The court in its memorandum did not change its favorable assessment of Farabaugh's credibility, though it said that the impact of the visit to him by the Internal Revenue Service could not be discounted.[5] Rather, it pointed out that at the close of the hearing on January 13, 1989, it found Farabaugh to be the more credible witness and it did not suggest in the memorandum that this finding had been wrong. Of course, inasmuch as the court did not change its assessment of Gneuhs's testimony, the impact of Clark's visit on Farabaugh was hardly significant, as there was no believable testimony that Farabaugh harbored any bias against Tozzi. Thus, though the allegations against Farabaugh disturbed the court, inasmuch as it accepted Farabaugh's testimony, it found that Farabaugh had not known Tozzi before the trial and had not made the statements attributed to him by Gneuhs.

Why then was a new trial granted? The district court said that "the allegations and evidence of possible juror bias are troubling." The problem with that statement is that allegations and evidence make no difference if they are not accepted. In short, no matter how strong an allegation, if it is rejected, as it was here, it is immaterial. The court also said that the denial of impropriety by Farabaugh must be tempered

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4. Tozzi had an opportunity to corroborate Gneuhs's testimony as Gneuhs suggested that there had been prior dealings between Farabaugh and Acme. Tozzi produced no evidence in support of this claim.

5. This apparently reflected a slight modification of the court's approach for at the close of the hearing on January 13, 1989, when Tozzi raised the question of Clark's interview, the court observed that "I don't think that's of any great consequence."

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by the fact that he was, against the court's order, interviewed by Clark. The difficulty with this statement is manifest. The visit by Clark was significant only if it affected Farabaugh's testimony, but the court accepted that testimony and rejected that of Gneuhs.[6]

The court also said that the jury, which at first was unable to reach a verdict, took nearly two days to do so. The court noted that the jury at Tozzi's first trial could not reach a unanimous verdict. These circumstances, however, only demonstrated that the case was difficult.[7] Indeed, we do not think that it is particularly surprising that it took the jury almost two days to reach a verdict in a tax case in which there was about one week of testimony. In any event, once the factual predicate for the charge of bias was rejected, the fact that the case may have been close or difficult did not matter, as there was nothing in the record to impeach the integrity of the verdict and the court did not suggest that the evidence did not support the verdict.[8] Certainly, the length of the deliberations alone was no reason to grant a new trial.

The parties have briefed the question of whether a court to grant a new trial must find that a juror was

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6. Certainly a new trial could not be granted as a sanction for the violation of the court's directive regarding interviews of the jurors. Furthermore, the impact of the Clark visit on Farabaugh was not enhanced by the fact that the court had directed that it not take place.

7. The first trial was clearly a complicated affair, as it took about one month and was a joint trial of Alan Frank and Tozzi.

8. On March 13, 1989, Tozzi filed a report from a polygraph examiner which tended to support a conclusion that Gneuhs's testimony regarding what Farabaugh said was truthful. The government filed a motion to strike the report but it appears that no order was ever entered on its motion. The court, however, did not mention this report in its opinion and thus there is no indication that it relied on it in making its findings.

actually biased or whether bias can be implied from the circumstances established. *See, e.g., Smith v. Phillips*, 455 U.S. 209, 215, 102 S.Ct. 940, 945 (1982); *United States v. Salamone*, 800 F.2d at 1225 n.11; *United States v. Fern*, 778 F.2d at 992-93; *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1, 6 (3d Cir.), *cert. denied*, 355 U.S. 873, 78 S.Ct. 121 (1957); *De La Rosa v. Texas*, 743 F.2d 299, 305 (5th Cir. 1984), *cert. denied*, 470 U.S. 1065, 105 S.Ct. 1781 (1985); *United States v. Jones*, 707 F.2d 1169, 1173-74 (10th Cir.), *cert. denied*, 464 U.S. 859, 104 S.Ct. 184 (1983); *United States v. Vargas*, 606 F.2d 341, 344-45 (1st Cir. 1979). We, however, need not be concerned with that distinction because, even assuming that bias might in some circumstances be implied, though actual bias is not demonstrated, it could only be implied from facts. *United States v. Jones*, 707 F.2d at 1173. Here, however, there are no facts to support a claim of implied bias, as the district court accepted Farabaugh's testimony that prior to the trial he did not know Tozzi and he rejected Gneuhs's contrary testimony. Accordingly, as the district court had no reason to grant a new trial on the basis of juror prejudice and its other reasons for doing so were insufficient, the court abused its discretion in granting a new trial.

In view of the aforesaid, the order of May 31, 1989, granting Tozzi a new trial will be reversed, the verdict will be reinstated, and the matter will be remanded to the district court for further proceedings consistent with this opinion.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3456

THE UNITED STATES

vs.

ROBERT THOMAS SKELTON
a/k/a Tommy Skelton,
a/k/a Tommy Hayes Skelton
DONNA TOZZI a/k/a Donna E. Skelton
DEAN ANTHONY TOZZI
ALAN FRANK a/k/a A. Roy
JOHN A. KOVAL, SR.

United States of America,
Appellant

On Appeal from the United States
District Court for the
Western District of Pennsylvania
Criminal Action No. 87-228 [Rule 33]

SUR PETITION FOR REHEARING

PRESENT: HIGGINBOTHAM, Chief Judge, and
SLOVITER, BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD and SEITZ, Circuit Judges

The petition for rehearing filed by appellee in the above captioned matter

having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

S/MORTON I. GREENBERG
Circuit Judge

DATED: February 16, 1990